93-275

Supreme Court, U.S.
FILED
AUG 2 1993
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DANIEL R. WILEY - PETITIONER

vs.

SUPREME COURT OF THE STATE OF COLORADO ET AL.[1] - RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Daniel R. Wiley, pro se
561 East Platte Avenue
Colorado Springs, CO 80903
(719)632-6457

62 pp

QUESTION PRESENTED

May Colorado, consistent with the First and Fourteenth Amendments, prohibit individuals from disclosing to the public that an attorney has been privately censured or admonished by an instrumentality of the STATE?

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. . . . 3

STATEMENT OF THE CASE. 3

REASONS FOR GRANTING THE WRIT. . . . 14

CONCLUSION 20

INDEX TO APPENDICES

Appendix A	Order and Judgment, No. 92-1294 (D.C. No. 92-C-1326) (D. Colo.), United States Court of Appeals (10th Circuit 1993)
Appendix B	Memorandum Opinion and Order, Civil Action No. 92-C01326, United States District Court for the District of Colorado
Appendix C	First and Fourteenth Amendment of the United States Constitution
Appendix D	Letter from Grievance Committee, Supreme Court of the State of Colorado
Appendix E	Petition to Disclose Disciplinary Records
Appendix F	Order of Court, Petition to Disclose Disciplinary Records
Appendix G	Order of Court, January 24, 1991
Appendix H	Petition for Rehearing

TABLE OF AUTHORITIES CITED

Page

CASES

Baugh v. Judicial Inquiry and Review Commission
Appeals Court, 4th District, Lexis 11631 (1990) 15

Bridges v. California
314 U.S. 252, 270-71 (1941). 15

Butterworth v. Smith
110 S. St. 1376 (1990) 15

Cf. Lovell v. City of Griffin
303 U.S. 444, 450. 19

Henry v. Mississippi
379 U.S. 443 (1965). 18

John Doe v. Supreme Court of Florida
734 F. Supp 981 (S.D. Fla 1990). . . 15

Landmark Communications, Inc. v. Virginia
435 U.S. 829 (1978). 14

Love v. Griffith
266 U.S. 32, 33-34 19

Wiley v. Piranha Properties, Inc.
Colorado Supreme Court Case No. 90 SA 195. 8

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1993

Daniel R. Wiley, Petitioner

vs.

Supreme Court of the State of Colorado et al.[1], Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

---

1 Respondents are: SUPREME COURT, STATE OF COLORADO; LUIS D. ROVIRA, Chief Justice, JOSEPH R. QUINN, Justice, WILLIAM H. ERICKSON, Justice, GEORGE E. LOHR, Justice, HOWARD M. KIRSHBAUM, Justice, ANTHONY F. VOLLACK, Justice, MARY J. MULLARKEY, Justice, in their official capacities; GRIEVANCE COMMITTEE OF THE SUPREME COURT OF COLORADO; DAVID L. WOOD, its Chair, VICKI J. BRAUNAGEL, Vice Chairperson, MICHAEL E. McLACHLAN, Vice Chairperson, in their official capacities.

Petitioner, Daniel R. Wiley, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit. The Appeals Court refused to declare Colorado Rule of Civil Procedure 241.24(a) unconstitutional or remand for adjudication of the constitutional question. "Gag" Rule 241.24(a) violates Petitioner's fundamental rights guaranteed under the First and Fourteenth Amendments to the United States Constitution by forbidding disclosure of admonitions and private censures of Colorado lawyers.

OPINIONS BELOW

The opinion of the Court of Appeals appears in Appendix "A" to this petition. The opinion of the United States District Court appears in Appendix "B" to this petition.

JURISDICTION

The Court of Appeals's opinion in this matter was filed on May 11, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sections 1331 and 1343(3) and 42 USC Section 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution are set forth in Appendix "C."

STATEMENT OF THE CASE

This case raises an important question of first impression regarding the constitutionality of a key provision of Rule 241.24(a) of the Colorado Rule of Civil Procedure. The Rule provides that "[a]ny person having received notice that a private

censure or admonition has been imposed [on an attorney] shall treat such information as confidential." The Petitioner in this proceeding has argued that this provision violates the First Amendment to the United States Constitution because it subjects him to punishment for contempt of Court for engaging in truthful speech about a matter of legitimate public concern.

Rule 241.24(a)'s prohibition against the disclosure of information relating to sanctions imposed against lawyers cannot survive the rigorous analysis demanded by the First Amendment for three reasons. First, the United States Supreme Court has repeatedly ruled that the principal state interest underlying the Rule -- the protection of the reputation of lawyers -- is far too weak to justify the suppression of lawfully obtained, truthful information describing the final disposition of disciplinary proceedings. Second, the impact of the Rule is to subvert rather than

advance the state goal of assuring the integrity of the Bar because by requiring silence as the price of participation in the disciplinary process, the Rule creates a powerful disincentive to reporting wrongdoing by lawyers. And third, the Rule is at odds with the presumption of openness that attaches to judicial proceedings, including those conducted by a court-established Grievance Committees, and engenders the creation of secret law, raising the specter that the disciplinary process is not being conducted in an impartial and even-handed manner.

Petitioner, Daniel R. Wiley, was the complainant in attorney disciplinary proceedings in Colorado, which resulted in a "private admonition" of Kenneth L. Covell, who, at the time, was Chairman of the Ethics Committee of the Colorado Bar.

Respondent, Supreme Court of Colorado, is the highest Court in the State and is responsible for the supervision of the legal

profession within the State. It promulgates standards governing the conduct of a lawyer, and, with the assistance of the Grievance Committee, it determines what conduct may result in discipline or license revocation being imposed against lawyers. The Colorado Supreme Court promulgated Rule 241.24(a), and enforces it through the threat of the issuance of a contempt citation against any lawyer or layperson who violates the Rule.

Colorado Rule of Civil Procedure 241.24(a) requires that the proceedings of the Committee "and the records of the Committee, Committee panels, and hearing boards shall be confidential and shall not be made public." This provision forbids any person who has filed a disciplinary complaint against an attorney from even disclosing that fact or the bases for the charge.

The Rule also provides that notice of the disposition of Committee proceedings "shall be given to the lawyer, the

complainant, their counsel of record, and the Committee Counsel," but adds that "[a]ny person having received notice that an admonition or private censure has been imposed shall treat such information as confidential, and shall not divulge this information to anyone, except by order of the Colorado Supreme Court." To enforce the confidentiality requirement, the Rule warns that: "Any person who violates this provision may be subject to punishment for contempt of the Supreme Court."

By letter dated September 3, 1987, the Colorado Grievance Committee threatens Wiley with punishment for contempt of the Colorado Supreme Court, attached as Appendix "D."

In compliance with strict procedures spelled out in Rule 241.24(a), Wiley filed a petition dated May 30, 1989, which requested permission to disclose disciplinary records, attached as Appendix "E." On June 1, 1989, the Colorado Supreme Court denied Wiley's petition, attached as Appendix "F."

In Wiley v. Piranha Properties, Inc. Colorado Supreme Court Case No. 90 SA 195, Wiley requested that the court address the Constitutional question concerning Rule 241.24(a): May Colorado, consistent with the First Amendment to the United States Constitution, prohibit individuals from disclosing to the public that an attorney has been privately censured or admonished by an instrumentality of the State?

By order dated January 24, 1991, the Colorado Supreme Court dismissed Wiley's constitutional challenge with prejudice, attached as Appendix "G." The court refused to hear a challenge to the constitutionality of Rule 241.24(a)!

Wiley filed a petition for rehearing with the Court, attached as Appendix "H." The petition for rehearing was denied.

The Court's Order states that dismissal is required because Wiley failed to "file the reporter's transcript of the trial court proceedings containing evidence relevant to

the issues on appeal, as required by C.A.R. 10(b). "Without the transcript, this Court can neither determine whether the issue was properly preserved below, nor consider the constitutionality of the rule."

With all due respect, this rationale is entirely inapplicable to this case. As a matter of procedure mandated by the Colorado Supreme Court, the Constitutional issue could not be raised at trial, since the trial judge had no authority to grant appellant the relief he requested. Instead, the issue was raised prior to trial, in strict accordance with the special procedures the court has set up to handle requests for leave to disclose confidential disciplinary records. Rule 241.24(a) establishes the governing procedures quite clearly. It unambiguously requires that "[a]ny person" seeking leave to breach the confidentiality required for admonitions and private censures "shall file a petition setting forth the specific records sought

to be disclosed and the reasons why the disclosure should be permitted with the Supreme court." As the Rule makes clear, only the Colorado Supreme Court is empowered to act on such a request, and, thus, only the Colorado Supreme Court is empowered to review the constitutionality of the Rule.

Adhering to the procedures laid out in Rule 241.24(a), on May 30, 1989, Wiley filed a Rule 241.24(a) petition asking that an order be entered permitting him to raise the fact that disciplinary action had been taken against a key defense witness Kenneth Covell, the President of the principal defendant, Piranha Properties, Inc. Wiley's petition made it clear that "[s]uch specific disclosure would be used to show bias or interest of [Mr. Covell] against Mr. Wiley or his interests."

In view of Wiley's strict compliance with the procedures spelled out in rule 241.24(a), it is difficult to discern the basis for the Court's order of dismissal.

The dismissal order implies that Wiley had a duty to raise his claims before the trial court. But if Wiley had sought to raise this issue before the trial court, he would have confronted two obvious and insuperable obstacles. First, Rule 241.24(a) explicitly n confers on the Colorado Supreme Court, and the Colorado Supreme Court alone, the power to consider requests to waive the confidentiality restrictions imposed by that Rule. Hence, the trial judge would have been powerless to act on appellant's request. Second, any further effort to press this issue before the trial court -- after the Colorado Supreme Court's June 1, 1989 ruling -- would have been futile at best, disrespectful and contemptuous!

For these reasons, it is respectfully submitted that Petitioner fully preserved his constitutional challenge to the constitutionality of Rule 241.24(a).

As a result of the operation of Rule 241.24(a), even those with knowledge of

attorney misconduct are forbidden from disclosing to anyone the nature of their complaints and, should the attorney in question receive an admonition or private censure, from disclosing that fact as well. The Rule, thus, makes it impossible for Petitioner to examine the records of the Committee and denies Petitioner's ability to discuss the nature and results of the Committee's proceedings or use the admonishment at trial. Because the vast majority of the charges brought before the Committee do not result in public sanctions, Rule 241.24(a) effectively deprives the public of any significant information about the workings of Colorado's lawyer disciplinary system.

Rule 241.24(a), which categorically denies the public access to the work of the Committee, is based on the paternalistic assumptions that the public is not capable of understanding either that there is an important difference between an admonition

and censure on the one hand, and the more serious sanctions of suspension and disbarment on the other, and that there is a difference between an unverified charge, which has yet to be investigated and which may or may not prove to have merit, and a formal act by the Committee either rejecting the charge or imposing a sanction against an attorney.

By promulgating and threatening to enforce Rule 241.24(a), the defendants have violated and will continue to violate the First Amendment of the United States Constitution applicable to the State of Colorado through the Fourteenth Amendment, and have deprived Wiley of rights, privileges, and immunities to which they are entitled in violation of 42 U.S.C. Section 1983. Rule 241.24(a) impermissibly restricts the flow of truthful information relating to the disciplinary proceedings of the Grievance Committee. Rule 241.24(a) serves no legitimate state interest and, in

any event, is not narrowly drawn to serve any legitimate interest that the State of Colorado might have.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for several reasons. First, the Tenth Circuit's opinion in this case conflicts with many previous opinions of this Court concerning free speech. The scrutiny applied in this case must be particularly intense because Colorado threatens to punish truthful speech relating to the integrity of the judicial process -- speech which traditionally has been recognized as lying at the core of the First Amendment. Landmark Communications, Inc. v. Virginia. 435 US 829 (1978) As the Court observed its "prior cases have firmly established that injury to official reputation is an insufficient reason for repressing speech that would otherwise be free." 425 U.S. at 841-42.

Justice Black made the same point nearly fifty years earlier in Bridges v. California, 314 U.S. 252, 270-71 (1941).

"Enforcing silence about proven lawyer misconduct will certainly breed suspicion and contempt much more than it would enhance respect."

Most recently, in Butterworth v. Smith, 110 S. St. 1376 (1990), this Court reviewed a Florida statute that prohibited a Grand Jury witness from ever disclosing the testimony which he gave before that body. The Court found that absent exceptional circumstances reputational interests alone cannot justify the proscription of truthful speech.

In a recent decision of the United States Court of Appeals for the Fourth Circuit in Baugh v. Judicial Inquiry and Review Commission, 1990 Lexis 11631 July 2, 1990, the Appeals Court, 4th District, struck down a similar "gag" rule to Colo Rule 241.24. Also see John Doe v. Supreme

Court of Florida, 734 F Supp 981 (S.D. Fla 1990). There is no justification whatsoever for denying the public access to formal sanction decisions. Because the Tenth Circuit Court of Appeals's opinion conflicts with the above cited cases, this case is ripe for review by this Court.

The Colorado Supreme Court has woefully shirked their duty to adjudicate this case on the merits of the constitutional challenge. Respondent has fabricated a procedural default, citing the fact that there is no trial transcript concerning the constitutional challenge. They denied the petition to raise the issue at trial and created a situation where no transcript could be made. They used this judicial hocus-pocus to justify their refusal to hear this case, which has erroneously been upheld by the lower Federal courts as a final State Court judgment.

The Tenth Circuit's opinion states on page 6: "He [Wiley] has only a hypothetical

interest in seeing Rule 241.24(a) declared unconstitutional." It also states that a Plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured in the future.

This analysis if fatally followed, as Wiley is "gaged" in perpetuity! This is not a proper time, place, or manner restriction of speech.

Wiley is being irreparably injured by the existence and threatened enforcement of Rule 241.24(a) because the Rule denies Wiley the ability to divulge truthful information and to obtain from any source information relating to the handling and disposition of disciplinary charges brought against attorneys licensed by the State of Colorado by private citizens, except where the attorney receives a public sanction. As a result, Wiley cannot write, speak, or comment on Wiley's proceedings before the

Committee or disclose the admonishment at trial.

Unless Respondents are enjoined from enforcing Rule 241.24(a), Wiley will be irreparably harmed and will continue to be deprived of the use of truthful information relating to attorney disciplinary proceedings in the State of Colorado.

In Henry v. Mississippi 379 US 443 (1965), the Supreme Court focused on the purpose of the state procedural rule. The Court determined that failure to comply with a Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence did not necessarily block review of the underlying constitutional claim. "[A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate State interest. In every case we must inquire whether the enforcement of a procedural forfeiture

serves such a State interest. If it does not, the State procedural rule ought not be permitted to bar vindication of important federal rights."

As Mr. Justice Holmes said: "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail . . . Whether the right was denied or not given due recognition by the [State Court] . . . is a question as to which the plaintiffs are entitled to envoke our judgement." Love v. Griffith, 266 U.S. 32, 33-34.

The U.S. Supreme Court has consistently held that the question of when and how defaults in compliance with State procedural rules can preclude our consideration of a federal question is itself a federal question. Cf. Lovell v. City of Griffin, 303 U.S. 444, 450.

The actions of Respondent in avoiding the constitutional challenge have deprived

Wiley of his First and Fourteenth Amendment rights. This Court should grant certiorari here to explicitly rule that Colorado Rule of Civil Procedure 241.24(a) is unconstitutional or remand to the State of Colorado for a legitimate adjudication of the issue and to resolve the conflict between the circuits created by the Tenth Circuit's decision in this matter.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter. Petitioner respectfully requests that this Court confirm my liberty in law.

DATED: AUGUST 17 1993

Respectfully submitted,

DANIEL R. WILEY, pro se
561 East Platte Avenue
Colorado Springs, CO 80903
(719(632-6457

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DANIEL R. WILEY, Plaintiff-Appellant, v. SUPREME COURT, STATE OF COLORADO; LUIS D. ROVIRA, Chief Justice, JOSEPH R. QUINN, Justice, WILLIAM H. ERICKSON, Justice, GEORGE E. LOHR, Justice, HOWARD M. KIRSHBAUM, Justice, ANTHONY F. VOLLACK, Justice, MARY J. MULLARKEY, Justice, in their official capacities; GRIEVANCE COMMITTEE OF THE SUPREME COURT OF COLORADO; DAVID J. WOOD, its Chair, VICKI J. BRAUNAGEL, as Vice Chairperson, MICHAEL E. MCLACHLAN, as Vice Chair-person, in their official capacities, Defendants-Appellees	)	No. 92-1294 (D.C. No. 92-C-1326) (D. Colo.)

ORDER AND JUDGEMENT*

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Before MOORE and BRORBY, Circuit Judges, and VAN BEBBER,** District Judge.

**Honorable G. Thomas Van Bebber, District Judge, United States District Court for the District of Kansas, sitting by designation.

---

page 1

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

This case requires us to decide whether the district court correctly found itself without jurisdiction to hear plaintiff's compliant regarding the constitutionality of Colorado Rule of Civil Procedure 241.24(a), both as applied to him and in general. Because the district court lacked jurisdiction to hear Plaintiff's challenge to the Rule as applied to him, and because

plaintiff lacks standing to challenge the Rule as a general matter, we affirm the district court's dismissal of this case.

In 1987, plaintiff-appellant Daniel R. Wiley filed a grievance against a Colorado lawyer which resulted in the issuance of a private letter of admonition to the lawyer. The fact of the admonition is required to be kept confidential by Colo. R. Civ. P. 241.24(a) (the Rule).[1] Plaintiff later

---

[1] Rule 241.24(a) in effect at the relevant time provided in pertinent part:

> Upon final determination of any proceedings conducted pursuant to these rules, notice of the disposition of the matter shall be given by the Clerk of the Supreme Court to the lawyer, the complainant, their counsel of record and the Committee Counsel. Any person having received notice that an admonition or private censure has been imposed shall treat such information as confidential and shall not divulge such information to anyone, except by order of the Supreme Court. Any person, other than the Committee, Committee Counsel or Disciplinary Counsel as specified in C.R.CP. 241.24(B), who wishes to disclose the pendency, subject matter, and status of proceedings conducted pursuant to these rules shall file a petition setting

(continued on next page)

filed suit against a

business entity of which the lawyer was president and, as required under the Rule, petitioned the Colorado Supreme Court for permission to disclose facts concerning the grievance proceeding at the trial. Plaintiff did not raise any constitutional challenge to the Rule at that time. The Colorado Supreme Court denied plaintiff's petition.

After plaintiff lost at trial, he appealed to the Colorado Court of Appeals, where he first raised the issue of the constitutionality of the Rule. Because of the presence of the constitutional issue, the court of appeals transferred the case to

---

(continued from previous page)
forth the reasons why the disclosure should be permitted with the Supreme Court. Any person who violates this provision may be subject to punishment for contempt of the Supreme Court.

the Colorado Supreme Court pursuant to Colo. Rev. Stat. Sec. 13-4-102(1)(b) (1987). That court dismissed plaintiff's constitutional claim with prejudice because he had failed to file a trial transcript as required by Colorado Appellate Rule 10(b). Plaintiff's remaining issues on appeal were remanded to the Colorado Court of Appeals. Plaintiff then filed this action in the United States District court for the District of Colorado, naming the Colorado Supreme Court, that court's grievance committee, and the individual members of each body as defendants. His action under 42 U.S.C. Sec. 1983 alleged that, as applied, the Rule deprived him of his rights under the First and Fourteenth Amendments. He also requested a declaratory judgment that the

---

Rule is unconstitutional and an injunction against its enforcement.

The district court dismissed the case under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. In so doing, the court properly relied on District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). In Feldman, the Court held that a federal court had no subject matter jurisdiction to review a state court's denial of the petitioners' individual applications for waiver from state bar admission rules. Id. at 482. "[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings." Id. Because part of plaintiff's complaint here alleged error in the way Rule 241.24(a) was applied in his case, the district court was correct to conclude that it lacked jurisdiction.

The second part of Feldman, however, provided that, tot he extent petitioners had mounted a general challenge to the constitutionality of the bar rules, jurisdiction in the federal court would lie.

Id. at 482-83. That is so because such challenges

> do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the district court is not reviewing a state-court judicial decision.

Id. at 486.

In Facio v. Jones, 929 F.2d 541 (10th Cir. 1991), this court addressed a situation remarkably similar to plaintiff's. In Facio, the plaintiff had filed a motion in Utah state court to set

aside a default judgment. The state court judge denied the motion because the

plaintiff had not presented proof of a meritorious defense as required under Utah law. The plaintiff then filed a Sec. 1983 action in federal court alleging deprivation of his Fourteenth Amendment rights. The district court found the Utah procedural requirement to be unconstitutional and set aside the default judgment. This court reversed.

Citing Feldman, this court in Facio held that the district court had no jurisdiction to set aside the default judgment because federal district courts lack jurisdiction to reverse a state court judgment. Id. at 543. The plaintiff, however, had also requested a declaratory judgment holding the Utah default procedure unconstitutional. The court found jurisdiction to be lacking over this claim as well because Feldman had also prohibited

> . . . federal courts from issuing any declaratory relief that is 'inextricably intertwined' with the state court judgment."

Id. (quoting Feldman, 460 U.S. at 483-84 n.16). The court explained that the plaintiff's request for declaratory relief was inextricably intertwined with his request to vacate the default judgment. Id.

> [T]he two forms of relief are so intertwined, in fact, that if [plaintiff] is not able to set aside the default judgment against him, he would lack standing to assert his second claim, which is the request that the federal court declare Utah's default judgment procedures unconstitutional. Unless [plaintiff's] default judgment is upset, his only interest in Utah's default judgment procedures is prospective and hypothetical in nature. He cannot establish a sufficient interest in the future application of those procedures to him to establish a constitutional case or controversy.

Id. Because the plaintiff had not "demonstrated any real chance of being subjected in the future to Utah's procedures for reversing default judgments," id. at 544, he lacked the standing necessary to confer jurisdiction on the district court. Id. at 545.

Plaintiff's complaint here suffers from the same defect. Unless the Colorado Supreme Court's dismissal of his claim is upset, he has only a hypothetical interest in seeing Rule 242.24(a) declared unconstitutional. Like Mr. Facio, plaintiff has not demonstrated any real chance of being involved in the future with an attorney discipline proceeding in Colorado and the attendant confidentiality provisions. A plaintiff "cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of

being likewise injured in the future." Id. at 544. Without this showing, the court had no jurisdiction to hear plaintiff's general challenge to the Rule's constitutionality because plaintiff did not have the requisite standing. "[T]he federal courts have 'no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" Id. at 545 (quoting Liverpool, N.Y. & Phila. S.S. Co. v. commissioners of Emigration, 113 U.s. 33 (19885)).

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

John P. Moore
Circuit Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-C-132

DANIEL R. WILEY,

Plaintiff,

v.

SUPREME COURT OF THE STATE OF COLORADO, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

CARRIGAN J.

Pro se plaintiff Daniel R. wiley commenced this action contending that Colo. R. Civ. P. 241.24(a) violates his rights under the First and Fourteenth Amendments to the United States Constitution. He requests that this court declare Rule 241.24(a) unconstitutional, enjoin defendants from enforcing that rule, grant him a new state-court trial, and award him his costs and attorneys' fees. Defendants, the Supreme

Court of the State of Colorado, its Chief Justice Luis D. Rovira and Justices Joseph R. Quinn, William H. Erickson, George E. Lohr, Howard M. Kirshbaum, Anthony F. Vollack, and Mary J. Mullarkey; and the Grievance Committee of the Supreme Court of Colorado, its Chair David L. Wood, and Vice-Chairpersons Vicki J. Braunagel and Michael E. McLachlan, have filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

page 1

Plaintiff has responded by opposing the motion.

The issues have been fully briefed and oral argument would not materially facilitate the decision process. Plaintiff alleges that jurisdiction exists under 28 U.S.C. Sections 1331 and 1343(a)(3).

A. Factual and Procedural History.

Wiley filed a grievance against a

Colorado attorney that resulted in a letter of admonition to that attorney. Thereafter Wiley received a letter from the Colorado Supreme Court Grievance Committee informing him that he was not at liberty to discuss the grievance committee's investigation or its outcome, and that to do so would be a violation of Colo. R. Civ. P. 241.24 that could subject him to punishment for contempt.

Rule 241.24(a) provides that any individual who receives notice that an admonition or private censure has been imposed upon an attorney is forbidden from disclosing that information to anyone, except by order of the Colorado Supreme Court.

Wiley subsequently brought an action against Piranha Properties and Richard Hadley in the state district court for El Paso County, Colorado. Prior to trial, Wiley filed a petition with the Colorado Supreme Court pursuant to Rule 241.24(a)

seeking leave to disclose the grievance and the resulting disciplinary action wnile examining the Colorado attorney who was the subject of the above grievance. Wiley did not raise a constitutional challenge to Rule 241.24(a) in the petition. The Colorado Supreme Court denied the petition. Defendants Piranha

and Hadley prevailed at that trial.

Wiley then appealed to the Colorado Court of Appeals, raising a constitutional challenge to Rule 241.24(a). The Court of Appeals transferred the appeal to the Colorado Supreme Court because of the constitutional challenge. The Colorado Supreme Court dismissed with prejudice Wiley's constitutional challenge to Rule 241.24(a) for failure to file a transcript of the trial court proceedings as required by Colo. App. R. 10(b). Wiley did not file

a petition for writ of certiorari in the United States Supreme Court, rather he commenced the instant action.

B. Motion to Dismiss.

Defendants contend that this action is a collateral attack on a final decision of the Colorado Supreme Court and therefore this court lacks subject matter jurisdiction over the plaintiff's claims.

It is well settled that a federal district court has no jurisdiction to review a final judgment of a state court in judicial proceedings. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Van Sickle v. Holloway, 791 F.2d 1431, 1436 (10th Cir. 1986). Such review must be sought in the United States Supreme Court. Id. both cites; 28 U.S.C. Sec. 1257.

In Feldman, however, the Supreme Court recognized a distinction between a challenge to a state court's application of a rule or statute and a general challenge to the constitutionality of the rule or statute.

The Court there held

---

that although the plaintiffs could not challenge in a federal district court the final judgment in a bar admission case, they could assert a general challenge to the constitutional validity of the bar admission rule. Feldman, 460 U.S. at 483-87.

Wiley contends that the instant action is a generalized constitutional challenge to Rule 241.24(a), and therefore this court has subject matter jurisdiction. The generalized challenge distinction recognized in Feldman does not apply, however, where a constitutional claim has already been decided by a state court. Howell v. Supreme Court of Texas, 885 F.2d 308, 312 (5th Cir. 1989); Strauss v. Drew, 739 F. Supp. 1231, 1235 (N.D. Ill, 1990); See Anderson v. Colorado, 793 F.2d 262, 263 (10th Cir. 1986) ("Where a constitutional issue could have

been reviewed on direct appeal by the state appellate courts, a litigant may not seek to reverse or modify the state court judgment by bringing a constitutional claim under 42 U.S.C. Section 1983."). Indeed, the Feldman court stated:

> "Challenges to the constitutionality of state bar rules . . . do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. . . . United States district courts . . . have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case." Feldman, 460 U.S. at 486 (emphasis added).

A plaintiff in such a case must show that the allegations in the federal district

court case are not related to the issues already ruled upon the state supreme court. White v. Judicial Inquiry & Review Bd, 744 F. Supp. 658, 666 (E.D. Pa. 1990).

page 4

Here, as in Howell, the plaintiff did raise his constitutional claim in the state court. Therefore, allowing a new challenge in federal district court would necessarily require review of the final state court judgment. Wiley is calling upon this court to review the Colorado Supreme Court's decision to dismiss with prejudice his constitutional challenge to Colo. R. Civ. P. 241.24(a). Because this court does not have jurisdiction to exercise such review, the complaint must be dismissed for lack of subject matter jurisdiction.

Accordingly, IT IS ORDERED that:

(1) Defendant's motion to dismiss is granted; and

(2) Plaintiff's claims and action are dismissed.

Dated at Denver, Colorado August 31, 1992.

BY THE COURT:

JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

page 5

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:
David Feola, Esq.
Assistant Attorney General
110 16th St. 10th Fl.
Denver, CO 80202

Daniel Wiley, Esq.
561 E. Platte Ave.
Colorado Springs, CO 80903

Deputy Clerk

Dated: August 31, 1992

Re: 92-C-1326

APPENDIX "C"

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "D"

GRIEVANCE COMMITTEE
SUPREME COURT · STATE OF COLORADO

Dominion Plaza
600 - 17th Street, Suite 500 S
Denver, CO 80202-5435
(303)893-3393

September 3, 1987

PERSONAL AND CONFIDENTIAL

Daniel R. Wiley
561 East Platte Ave.
Colorado Springs, CO 80903

Re: Request for Investigation you filed against Kenneth Covell

Dear Mr. Wiley:

We have been contacted by a reporter who had a copy of the letter of admonition issued to Mr. Covell. Since Mr. Covell did not give the letter to her, I am concerned that you may have. It is of paramount importance that you, too, abide by the rules which you have sought to apply to Mr. Covell. Specifically, you are not at liberty to discuss the Grievance Committee's

investigation or its outcome with anyone, let alone the press. To do so is in violation of the confidentiality rule and subjects you to punishment for contempt of the Colorado Supreme Court.

Please refrain from any dissemination of information concerning the grievance process involving Mr. Covell.

Sincerely,

_____

Jewell K. G. Biddle
Investigative Counsel

JKGB:sm

APPENDIX "E"

SUPREME COURT, STATE OF COLORADO

PETITION TO DISCLOSE DISCIPLINARY RECORDS

PETITIONER Daniel R. Wiley, through his attorney John W. Swanson, and pursuant to Colorado rules of Procedure 241.24 (a) petitions this Court for permission to disclose certain disciplinary records and states:

1. Daniel R. Wiley is a Plaintiff in an action between himself and Defendants Pirahna Properties, a Colorado corporation (Pirahna), and Richard H. Hadley, Case Number 84 CV 0627, District Court, El Paso County, Colorado, set for trial next Monday, June 5, 1989.

2. Kenneth L. Covell, Esq., a Colorado attorney is listed as a witness in the above action as the President of Defendant Pirahna.

3. Mr. Wiley filed a grievance against Mr. Covell with the Colorado Supreme Court Grievance Committee. Disciplinary action was taken.

4. Mr. Wiley desires to raise the grievance and resulting disciplinary action i the trial examination of Mr. Covell.

5. Such specific disclosure would be used to show bias or interest of Mr. Covell against Mr. Wiley or his interests.

6. Defendants Pirahna and Hadley are represented in the present action by Robert Dunlop, Esq. 25 East Cache La Poudre, Suite 103, Colorado Springs, Colorado 80903, phone (719) 475-2430.

7. Present counsel entered his appearance on this case on May 12, 1989 after Petitioner's previous attorneys had moved to withdraw.

WHEREFORE, Petitioner prays this Court will allow the disclosure of the fact that Petitioner grieved Mr. Covell and that Mr. Covell was disciplined through this Court,

in examination of Mr. Covell during trial of Case No. 84 CV 0627, El Paso District Court, Colorado starting June 5, 1989.

APPENDIX "F"

SUPREME COURT, STATE OF COLORADO

ORDER OF COURT

IN RE: PETITION TO DISCLOSE DISCIPLINARY RECORDS

Upon consideration of Petitioner's Petition To Disclose Disciplinary Records relating to Kenneth L. Covell filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED, that said Petition is DENIED.

BY THE COURT, JUNE 1, 1989.

cc: Linda Donnelly
Disciplinary Counsel

James P. Hollaway
Grievance Committee Counsel
600 - 17th St., Suite 500 S
Denver, CO 80202-5435

John W. Swanson
P. O. Box 18157
1756 Gilpin Street
Denver, CO 80218

Kenneth L. Covell
#500 - Holly Sugar Building
Colorado Springs, CO 80903

Robert Dunlop
25 East Cache La Poudre
Suite 103
Colorado Springs, CO 80903

APPENDIX "G"

SUPREME COURT, STATE OF COLORADO
CASE NO. 90SA195
TRANSFER FROM THE COLORADO COURT OF APPEALS, #89CA1200
APPEAL FROM DISTRICT COURT, EL PASO COUNTY, #84CV0627

ORDER OF COURT

DANIEL R. WILEY,

Plaintiff-Appellant,

v.

PIRAHNA PROPERTIES, a Colorado corporation, and RICHARD H. HADLEY,

Defendants and Third-Party Plaintiffs-Appellees,

v.

CRAIG KEMPER, DAVID P. WILEY and RICHARD H. HADLEY,

Third-Party Defendants.

By order dated May 3, 1990, this case was transferred to the Supreme Court because the Appellant, Daniel Wiley, challenged the constitutionality of C.A.R. 241.24. See Section 13-4-102(1)(b), 6A C.R.S. (1987).

The Appellant, however, did not file the reporter's transcript of the trial court proceedings containing evidence relevant to the issues on appeal was required by C.A.R. 10(b). Without the transcript, this court can neither determine whether the issue was properly preserved below, nor consider the constitutionality of the rule. Therefore,

IT IS ORDERED that the Appellant's constitutional claims are DISMISSED with prejudice.

IT IS FURTHER ORDERED that the remaining issues are remanded to the Colorado Court of Appeals for determination.

BY THE COURT, EN BANC, JANUARY 24, 1991.

APPENDIX "H"

SUPREME COURT, STATE OF COLORADO
CASE NO. 90 SA 195
TRANSFER FROM THE COLORADO COURT OF APPEALS, #89CA1200

Appeal from the District Court, El Paso County, State of Colorado No. 84 CV0627
Honorable David D. Parrish, District Judge

PETITION FOR REHEARING

Daniel R. Wiley, plaintiff-appellant ("appellant") in this proceeding, hereby petitions this Court for Rehearing of its Order of January 24, 1991, dismissing the appellant's constitutional claims with prejudice, and remanding the remainder of this case to the Court of Appeals. The grounds for this Petition are as follows:

1. This Court's Order states that dismissal is required because appellant failed to "file the reporter's transcript of the trial court proceedings containing evidence relevant to the issues on appeal as required by C.A.R. 10(b). Without the

transcript, this court can neither determine whether the issue was properly preserved below, nor consider the constitutionality

---

of the rule."

With all due respect, this rationale is entirely inapplicable to this case. As a matter of procedure mandated by this Court, the Constitutional issue could not be raised at trial, since the trial judge had no authority to grant appellant the relief he requested. Instead, the issue was raised prior to trial, in strict accordance with the special procedures this Court has set up to handle requests for leave to disclose confidential disciplinary records. Rule 241.24(a) establishes the governing procedures quite clearly. It unambiguously requires that "[a]ny person" seeking leave to breach the confidentiality required for admonitions and private censures "shall file

a petition setting forth the specific records sought to be disclosed and the reasons why the disclosure should be permitted with the Supreme Court." As the Rule makes clear, only this Court is empowered to act on such a request, and, thus, only this Court is empowered to review the Constitutionality of the Rule.

Adhering to the procedures laid out in Rule 241.24(a), on May 30, 1989, immediately prior to the trial in this case, appellant filed a Rule 241.24(a) petition with this Court, asking that an order be entered permitting him to raise the fact that disciplinary action had been taken against a key defense witness -- the President of the principal defendant, who had at one time acted as appellant's lawyer. Appellant's petition made it clear that "[s]uch specific disclosure would be used to show bias or

interest of [the attorney] against Mr. Wiley or his interests." By Order dated June 1, 1989, this Court denied appellant's petition. Both appellant's petition, and this Court's Order of June 1, 1989, are appended to appellant's brief to this Court as exhibits B and C.

In view of appellant's strict compliance with the procedures spelled out in Rule 241.24(a), it is difficult to discern the basis for the Court's recent order of dismissal. The dismissal order implies that appellant had a duty to raise his claims before the trial court. But if appellant had sought to raise this issue before the trial court, he would have confronted two obvious and insuperable obstacles. First, Rule 241.24(a) explicitly confers on this Court, and this Court alone, the power to consider requests to waive the confidentiality restrictions imposed by that Rule. Hence, the trial judge would have been powerless to act on appellant's

request. Second, any further effort to press this issue before the trial court -- after this Court's June 1, 1989 ruling -- would have been futile at best and disrespectful at worst.

For these reasons, it is respectfully submitted that appellant fully preserved his constitutional challenge to the constitutionality of Rule 241.21(a). Accordingly, the Court should vacate its January 24, 1991 Order of dismissal and proceed the assess the merits of appellant's constitutional challenge.

2. The Court's direction that appellant's constitutional

---

challenge should be dismissed with prejudice appears unduly harsh, especially since appellant is proceeding pro se. Appellant received no notice that there were any defects or omissions in his submissions to

the Court, prior to his receipt of the dismissal order. If the deficiency identified by the Court can be cured, appellant submits that he ought to be given a reasonable opportunity to do so, and that dismissal under such circumstances would be inappropriate.

CONCLUSION

For the reasons stated above, appellant's petition for rehearing should be granted, and this Court should proceed to resolve the merits of appellant's challenge to the constitutionality of Rule 241.24(a).

Respectfully submitted,

Daniel R. Wiley
561 East Platte
Colorado Springs, Colo. 80903

Appellant Pro Se